THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 267 OF 2017

TORNADO CARRIERS LIMITED.....APPELLANT

-VERSUS-

THREEWAYS SHIPPING (K) LIMITED.....RESPONDENT

(An Appeal from the judgment of Honourable H. Nyakweba, Principal Magistrate, delivered on 15th November, 2017 in Mombasa Chief Magistrate's Court Civil Case No. 2340 of 2015).

JUDGMENT

1. The suit in the lower court was that the parties herein got into an agreement where the appellant offered transport services to the respondent in respect of imported containers from Mombasa to Kampala in the years 2011, 2012, and 2013. That it was an express and/or implied term of the said contract of service that the respondent would supervise the loading and sealing of the containers at the point of loading and be responsible for the offloading of the containers.

2. The appellant's case was that it offered transport services to the respondent on credit basis up to 30th April, 2013 when the respondent failed to pay the outstanding amount of USD 11,510.00. The appellant however claimed for payment of the sum of USD 11,500.00 being the balance due and owing from the respondent on account of transport services together with interest at the rate of 20% per annum from 30th April, 2013 until payment in full.

3. The respondent filed its statement of defence dated 24th March, 2016, where it denied the appellant's allegations and averred that on behalf of its client (the consignee) it entrusted the appellant with cargo loaded in container No. CAXU 988339-0 weighing 30.4 tonnes for transportation from Mombasa to Kampala. It alleged that in breach of the contract and terms of carriage, the truck ferrying the container took 7 days to travel from Mombasa to Malaba and finally arrived at Kampala on 4th September, 2012 and that upon the consignee opening the container, the goods therein were found to be less by 7,220kg. The respondent alleged that container tampering was supported by the container seal which had a different bolt rivet.

4. The respondent further averred that its client declined to pay for the freight and agency and lodged a claim for the lost cargo against the respondent, who as per custom and past business engagement with the appellant was entitled to a set off for the value of lost cargo. The respondent also stated that the consignment note and the goods delivery note were not signed and stamped by the consignee thus indicating omission by the appellant.

5. In the lower court case, judgment was entered for the appellant in the sum of USD 3,200.00 against the respondent with interest at the rate of 20% per annum from 30th April, 2013 till payment in full. The Trial Magistrate also stated that the said amount was to attract interest at Court rates from the date of the suit till payment in full (sic).

6. The appellant was dissatisfied by the decision of the Trial Magistrate and on 11th December, 2017, it filed a memorandum of appeal raising the following grounds of appeal-

> (i) That the learned Trial Magistrate erred in law and fact in dismissing the appellant's claim for the sum of USD 8,310.00 when there was sufficient evidence on record to show that the entire amount of USD 15,510/= was due and payable from the defendant to the plaintiff;
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> (ii) That the learned Trial Magistrate erred in law and fact in failing to find that the defendant had admitted in evidence that the amount due and owing was the sum of USD 15,510.00 and that there was therefore no dispute over the same;
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> (iii) That the learned Trial Magistrate erred in both law and fact in finding that the plaintiff had failed to prove that they were entitled

to the sum of USD 11,510.00 when both the plaintiff's and the defendant's documents produced as evidence confirmed that the outstanding amount was USD 11,510.00;

(iv) That the learned Trial Magistrate erred in law and fact in failing to properly consider and evaluate the entire evidence placed on record by the parties;

(v) That the learned Trial Magistrate erred in law and fact in failing to correctly apply the law on the required standard of proof in civil cases thereby arriving at a wrong decision; and

(vi) That the learned Trial Magistrate erred in law and fact in holding that the defendant was bound to produce invoices for the entire sum of USD 11,510.00 when there was evidence on record to show that the defendant had admitted withholding USD 11,510.00 which was due to the plaintiff as outstanding transport charges.

7. The appellant's prayer is for this Court to allow the appeal with costs, set aside the judgment delivered by the Trial Magistrate dismissing the appellant's claim for USD 8,310.00 and for judgment to be entered for the appellant for the said sum of USD 8,310.00 plus costs and interest.

8. The appeal herein was canvassed by way of written submissions. On 9th March, 2020, the law firm of Sherman Nyongesa & Mutubia Advocates filed written submissions on behalf of the appellant. On 2nd February, 2021 this Court noted that initially the respondent's Counsel used to attend Court but he failed to attend Court on 18th December, 2019 and 7th September, 2020. This Court gave the respondent's counsel the last opportunity to file and serve written submissions within 30 days. Come the 2nd of March, 2021, no submissions had been filed and this Court proceeded to give a date for delivery of the Judgment based on the submissions that had been filed by the appellant's Counsel.

9. Mr. Wafula, the appellant's learned Counsel relied on the case of **Phil Mark Systems Co. Ltd vs Ander More Enterprises** [2018] eKLR, where the Court observed that in order to determine the issues between parties, one needs to look mainly at the plaint. He submitted that there was a statement from the appellant to the respondent showing all the goods transported. He further submitted that the appellant called PW1 and PW2 as witnesses and they testified that the appellant transported and delivered the containers in issue at the agreed destination.

10. It was also submitted that the respondent's witness, DW1, confirmed the existence of the contract and the only contention between the parties herein was whether the cargo was delivered intact. Mr. Wafula stated that at that juncture, the burden of proof shifted to the respondent to establish that the cargo was not delivered intact, which burden they failed to discharge. He thus asserted that the appellant proved that it had transported and delivered the respondent's cargo intact and it was entitled to full payment.

11. The appellant's Counsel indicated that it was not in dispute that there was an agreement between the parties herein to transport cargo at a fee and that the respondent in evidence admitted that it had not paid the appellant for services rendered because of the alleged cargo shortage. It was stated that the amount that was due and owing was USD 15,510.00. Mr. Wafula contended that the Trial Magistrate did not properly consider and evaluate the evidence that had been placed before him. The appellant's Counsel relied on the provisions of Section 35 of the Evidence Act Cap 80 Laws of Kenya which sets out the requirements for admissibility of documentary evidence as to facts in issue.

12. He stated that PW1 produced invoices showing that the appellant had not been fully paid the amount owed by the respondent, therefore the evidence placed before the Trial Magistrate was sufficient but he did not properly evaluate the same. Mr. Wafula submitted that DW1 admitted that the outstanding amount of USD 11,510.00 was not disputed and as such, the appellant was under no obligation to produce specific invoices for the amount of USD 8,310.00. He urged this Court to allow the appeal herein as prayed in the memorandum of appeal dated 8th December, 2017.

ANALYSIS AND DETERMINATION.

13. This Court has analyzed and re-examined the Record of Appeal and borne in mind the submissions by the appellant's Counsel. This being the first appeal arising from the lower Court case, this Court is guided by the principles stated in ***Williamsons Diamonds Ltd vs. Brown*** (1970) EA 1 and **Ramji Ratna and Company Limited vs Wood Products (Kenya) Limited, Civil Appeal No. 117 of 2001, t**hat in a first appeal the court is obliged to reconsider the evidence, assess it and make appropriate conclusions about it, remembering that it has not seen or heard the witnesses testify and make due allowance for the said fact.

14. An appellate court can only interfere with findings of fact made by the Trial Court if they were based on no evidence or on a misrepresentation of the evidence or if in reaching its decision the said Court applied the wrong legal principles. See the cases of **Sumaria & Another V Allied Industrial Limited, [2007] 2 KLR 1; Jabane V Olenja** [1986] KLR 661; **Simon Muchemi & Another V Gordon Osore** [2013] eKLR.

between the appellant and the respondent for the former to transport cargo at a fee. At page 5 of the judgment by the Trial Magistrate, he held that he was satisfied that the appellant had proved on a balance of probabilities that the cargo was delivered intact to the destination and therefore the respondent had no justification to withhold payment.

18. The said Magistrate also held that the appellant was entitled to the prayers sought in the plaint. He was however of the view that payment of USD 11,510.00 was a prayer for special damages and apart from being specifically pleaded, it ought to have been strictly proved. The Trial Magistrate noted that in an attempt to prove the said special damages, the appellant produced invoice No. 3573 dated 9th November, 2012 for USD 3,200.00 and that the demand letter dated 27th November, 2014 did not specifically show that the amount claimed therein is in respect of the cargo transported in container No. 988339-0 by the appellant's motor vehicle KAU 127H ZC 0764.

19. Special damages must not only be specifically pleaded but also strictly proved. This Court does not agree with the Trial Court's findings on the issue of proof of special damages in this case. I am guided by the decision of the Court of Appeal decision in **Richard Okuku Oloo vs South Nyanza Sugar Co. Ltd [2013] eKLR,** where the Court stated as follows-

> ***"We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.***
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> ***In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case:***
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> ***"It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:***
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> ***"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage from Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.***
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> ***"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."***

20. The appellant herein produced before the Trial Court an invoice No. 3573 dated 9th November, 2012 for USD 3,200.00 for delivery of container No. CAXU 988339-0 from Mombasa to Kampala as plaintiff exhibit 1. It also produced a demand letter dated 27th November, 2014, demanding payment of USD 11,500.00 on account of transport charges in respect of one container No. CAXU 9883390 in the year 2012 as plaintiff exhibit 4. From the said exhibits, it is clear that both the invoice and the demand letter were referring to the same container which is the subject of the appeal herein. I therefore find that the Trial Magistrate erred and misdirected himself in finding that the demand letter did not specifically show that the amount claimed therein was in respect of the cargo in container No. CAXU 988339-0 transported by the appellant's motor vehicle KAU 127H ZC 0764.

21. PW1's evidence before the Trial Court was that the respondent did not pay the appellant USD 11,500.00 for cargo transported. The respondent's witness confirmed that the respondent did not pay the appellant for transporting container No. CAXU 9883390 from Mombasa to Kampala. It did not also dispute the amount claimed by the appellant but instead, it justified the non-payment. The respondent's witness (DW1) appeared ill prepared for the hearing of the case in the lower court as failed to take with him to court many documents which would have assisted him to shed light on the allegations it made against the appellant. That was evident during cross -examination. The position of the law is that what is not disputed is deemed to be admitted. Given the said circumstances, the Trial Court erred in not accepting the uncontroverted evidence of the appellant which was admitted by the respondent and also proved on a balance of probability.

22. In **Nelson Rintari vs. CMC Group Ltd** [2015] eKLR, the Court held as follows-

> ***"…I agree a wrong doer must accept the victim as he finds him. The respondent cannot therefore urge the court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent's submissions are accepted this would do a lot of injustice to many Kenyans who have invested in informal sector and do not worry about keeping books of accounts. Further this would go against Article 159 (2) (d) of the constitution of Kenya 2010 which obliges courts to do justice without procedural technicalities..."***

23. This Court holds that the appellant proved that it was owed USD 11,500.00 by the respondent. Although in the grounds of appeal it stated that the claim was for USD 11,510.00, in the plaint, the claim was for USD 11,500.00. This court is guided by the plaint which was filed in the lower court in making a finding on the amount that was claimed by the appellant. The appeal herein is well merited and is hereby allowed in the following terms as prayed in the plaint dated 30th November, 2015 -

(i) The judgment dated 15th November, 2017 dismissing the appellant's claim for USD 8,300.00 be and is hereby set aside;

(ii) Judgment be and is hereby entered for the appellant in the sum of USD 8,300.00 with interest at the rate of 20% per annum from 30th April, 2013 until payment in full;

(iii) For the avoidance of doubt, the sum of USD 8,300.00 hereby awarded shall be in addition to the sum of USD 3,200.00 awarded on 15th November, 2017 thus making a gross amount of USD 11,500.00 with interest at the rate of 20% per annum from 30th April, 2013 until payment in full; and

(iv) The appellant is awarded costs of this appeal and of the case in the lower court.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 30TH DAY OF JULY, 2021. In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Asewe for the appellant

No appearance for the respondent

Mr. Cyrus Kagane – Court Assistant.